NO. 56774-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DIANE J. LEWIS, Individually and as Personal Representative of the Estate of RICHARD LEWIS,
Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,
Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

A party is not entitled to extra-statutory benefits. When a worker has a right to benefits under federal law for an injury, they are eligible only for limited relief under the Washington Industrial Insurance Act (WIIA). As the Board of Industrial Insurance Appeals (Board) and superior court determined, RCW 51.12.100 and RCW 51.12.102 preclude a worker from receiving anything but temporary, interim relief when the Longshore Harbor Workers' Compensation Act (LHWCA) causes a worker's condition. Almost 20 years of precedent confirms that this is the correct interpretation, and Diane Lewis—wife of deceased worker Richard Lewis—cannot distinguish the case law on either the facts or law.

Diane Lewis argues that the statutes "chill" the exercise of fundamental constitutional rights, impair the right to a jury, and violate her right to equal protection of the law. Not so. Diane Lewis lost the ability to receive temporary WIIA relief by entering into a settlement barred by the LHWCA. Since

RCW 51.12.102 provides for temporary relief only while an LHWCA claim is pending, Diane Lewis's forfeiture of the LHWCA claim also terminated the right to receive temporary WIIA relief. Because neither statute turns on the exercise of a constitutional right, Diane Lewis's constitutional challenges fail.

The Board and the superior court properly affirmed the Department's decision. This Court should also affirm.

II. ISSUE

> RCW 51.12.100 precludes workers' compensation benefits when a worker has a LHWCA right. RCW 51.12.102 provides that while a LHWCA right is pending a worker receives only WIIA temporary, interim benefits. Richard Lewis entered into an unauthorized settlement extinguishing both his right to WIIA or LHWCA benefits. Does this statutory scheme implicate any constitutional right?

III. STATEMENT OF THE CASE

A. The Parties Stipulated To the Facts

The facts are not in dispute. The case was tried on stipulated facts, and the stipulated facts resolve the issues under appeal. CP 397-99. While Diane Lewis also presented

additional evidence, that evidence does not put any material facts in dispute. The parties stipulated:

1. Richard Lewis was a career insulator and member of the Heat and Frost Insulators union local 7. Richard Lewis's widow, Diane Lewis, filed an application for benefits on April 1, 2020, with the Department of Labor and Industries (Department).

2. As an apprentice insulator, Richard Lewis performed insulation work at Todd and Lockheed Shipyards that exposed him to asbestos.

3. The apprenticeship training plan for heat and frost insulators, which was approved by the Department, requires that workers perform "ship and marine work" as part of the apprenticeship training program.

4. As an apprentice and journeyman insulator from 1980 to 2010, Richard Lewis performed insulation work at land based industrial facilities throughout Western Washington that exposed him to asbestos.

5. Richard Lewis was diagnosed with mesothelioma in May 2018 and died of mesothelioma on August 15, 2019.

6. Richard Lewis' mesothelioma was caused by occupational asbestos exposures.

7. Richard Lewis' exposure to asbestos at Todd and Lockheed Shipyards were substantial factors in the development of his mesothelioma.

8. Richard Lewis' land based asbestos exposures from 1980 to 2010 were substantial factors in the development of his mesothelioma.

9. Richard Lewis' last injurious exposure to asbestos occurred at land-based facilities in Western Washington.

10. But for the application of RCW 51.12.100 and RCW 51.12.102, and the case law interpreting those statutes, the Department would agree that Richard Lewis had an occupational disease that would be compensable under the Washington Industrial Insurance Act based on his employment working at land-based facilities in Western Washington from 1980 to 2010.

11. Richard Lewis suffered an occupational disease compensable under the Longshore and Harbor Workers Protection Act while working at Todd and Lockheed shipyards in the early 1980s.

12. Richard Lewis filed a personal injury claim on July 12, 2018 against fourteen defendants arising out of his mesothelioma diagnosis and received an expedited trial setting of April 8, 2019 due to this terminal illness.

13. Richard Lewis settled with the last remaining defendant in his personal injury claim on April 13, 2019 after one week of trial.

14. Because Richard Lewis settled his third-party asbestos claim before adjudicating a Longshore Act Claim to conclusion, he is ineligible to receive any benefits under the Longshore Act.

15. Because Richard Lewis' mesothelioma was proximately caused both by maritime employment subject to the Longshore and Harborworker's Compensation Act and by land-based employment in Washington that is not subject to the Longshore and Harborworker's Compensation act, the Department has determined that Diane Lewis is ineligible to receive industrial insurance benefits as Mr. Lewis's survivor under RCW 51.12.100. Because Richard Lewis and Diane Lewis are disqualified from receiving benefits under the Longshore Act due to the settlements Mr. Lewis accepted in his third-party claim, the Department has determined that Diane Lewis is also ineligible to receive temporary benefits under RCW 51.12.102.

CP 397-99.

B. The Board and Superior Court Affirmed

Following the entry of stipulations and testimony, the industrial appeals judge issued a proposed decision that affirmed the Department, observing that *Long v. Department of Labor & Industries*, 174 Wn. App. 197, 201-05, 299 P.3d 657 (2013), necessitated affirming the Department's order, particularly given that the beneficiary had waived the only relief that might have been available under *Long*. CP 50-57.[1]

[1] Counsel for Lewis specifically waived any claim that Lewis should have received benefits under RCW 51.12.102 for

The Board granted Diane Lewis's petition for review and issued a decision affirming the Department's decision that adopted the findings and conclusions in the proposed decision. CP 11, 26.

Diane Lewis appealed to superior court. CP 1-2. The superior court affirmed the Board and rejected her constitutional arguments. CP 460-64. She appeals. CP 465-66.

IV. STANDARD OF REVIEW

In an appeal from a superior court's decision in an industrial insurance case, the ordinary civil standard of review applies. RCW 51.52.140; *City of Bellevue v. Raum*, 171 Wn. App. 124, 139, 286 P.3d 695 (2012). This Court reviews the decision of the superior court rather than that of the Board. *See* RCW 51.52.140; *Rogers v. Dep't of Lab. & Indus.*, 151 Wn. App. 174, 179–81, 210 P.3d 355 (2009). The Administrative Procedure Act does not apply to workers' compensation cases

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the period from when the Department received her claim to the date that the Department determined that she was not entitled to relief under the WIIA. CP 317-18.

under RCW Title 51. RCW 34.05.030(2)(a), (c); *see Rogers*, 151 Wn. App. at 180.

This Court reviews the findings of the superior court solely to determine whether substantial evidence supports the findings, while it reviews questions of law de novo. *See Ruse v. Dep't of Lab. & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (citing *Young v. Dep't of Lab. & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996)). The court affirms the superior court if the findings of fact are supported by substantial evidence and the conclusions of law flow from the findings of fact. *Id*.

V. ARGUMENT

Contrary to Diane Lewis's argument (AB 38-48), the plain language of the statute and the case law support the Department's position that RCW 51.12.102 provides for only temporary, interim benefits under Washington's Industrial Insurance Act (WIIA) when a worker with an asbestos-related disease has an occupational disease that is subject to the

LHWCA. There is no constitutional issue implicated by this statutory scheme.

A. Diane Lewis May Not Receive Benefits Under the General Coverage Provisions of the WIIA Because the LHWCA Governed Richard Lewis's Claim

RCW 51.12.100 generally makes workers ineligible for any coverage under the WIIA for an injury or disease if the worker had coverage under the LHWCA. *Gorman v. Garlock*, 155 Wn.2d 198, 209, 213, 118 P.3d 311 (2005). RCW 51.12.100(1) states, "Except as otherwise provided in this section, the provisions of this title *shall not apply* to a master or member of a crew of any vessel, or to employers and *workers for whom a right or obligation exists under the maritime laws or federal employees' compensation act* for personal injuries or death of such workers." (Emphasis added).

As the Washington State Supreme Court recognized in *Gorman*, RCW 51.12.102 creates only a narrow exception to RCW 51.12.100's exclusion of coverage, allowing workers with asbestos-related diseases to receive "temporary, interim"

benefits from the Department while the claim for federal benefits is pending. *Gorman*, 155 Wn.2d 211-13. Once the worker receives a federal recovery, the Department not only terminates the worker's temporary benefits, it also recoups whatever temporary benefits it had made to the worker, unless the Director exercises discretion to waive the right to recovery. RCW 51.12.102(4)(a), (4)(c). *Gorman* emphasizes that the relief available under RCW 51.12.102 is temporary, interim relief to be provided while a federal claim is pending, and it distinguishes this limited right from a worker with general coverage of an injury under the WIIA. *Gorman*, 155 Wn.2d at 211-13. *Gorman* specifically concluded that workers with the right to temporary, interim relief under RCW 51.12.102 are not otherwise covered by the WIIA and do not have the rights provided in other sections of the statute, such as the right to sue an employer for an intentional injury under RCW 51.24.020. *Id*.

The appellate cases—including both *Gorman* and the cases decided after *Gorman*—reinforce that workers who have

injurious exposure while working for LHWCA-covered employment—and who therefore have valid LHWCA claims—have no coverage under the WIIA, apart from the temporary, interim benefits available under RCW 51.12.102. *Gorman*, 155 Wn.2d at 211-13; *Long*, 174 Wn. App. at 203-04; *Olsen v. Dep't of Lab. & Indus.*, 161 Wn. App. 443, 448-52, 250 P.3d 158 (2011). This is true even if the worker's last injurious exposure occurred in land-based employment that is not subject to the LHWCA. *Gorman*, 155 Wn.2d at 218; *Long*, 174 Wn. App. at 200, 206; *Olsen*, 161 Wn. App. 447-52. And, critical to the result in this case, *Long* held that the temporary, interim benefits that are available under RCW 51.12.102 must be terminated if the Department learns that the worker or beneficiary entered into a third-party settlement that results in the claimant forfeiting his or her right to receive a recovery under the LHWCA or other federal statute. *Long*, 174 Wn. App. 206-07.

Applying those legal principles to the stipulated facts here, the Department properly concluded that Richard Lewis and his beneficiaries are not entitled to coverage under the WIIA because he had harmful occupational exposure subject to the LHWCA, and thus he had rights and obligations under the LHWCA. *Gorman*, 155 Wn.2d at 211-13; *Long*, 174 Wn. App. at 203-04; *Olsen*, 161 Wn. App. 448-52. As a result, the only relief that could conceivably be available under Richard Lewis's claim are the temporary, interim benefits available under RCW 51.12.102, which the Department properly terminated based on the discovery that Richard Lewis had entered into a third-party settlement without his LHWCA employer's consent. *See Gorman*, 155 Wn.2d at 211-13; *Long*, 174 Wn. App. at 203-04, 06-07. The Department's only conceivable error in this regard—which counsel for Diane Lewis specifically waived any argument about—was its denial of benefits for a two-week period from the date that Diane Lewis filed her WIIA claim to the date that the Department

made a determination about her eligibility for benefits. *Gorman*, 155 Wn.2d at 211-13; *Long*, 174 Wn. App. at 203-04, 207.[2]

In *Long*, much like the current case, the claimant filed a claim with the Department but could not receive a recovery under the LHWCA because she had entered into a third-party settlement without the approval of the LHWCA employer. *Long*, 174 Wn. App. at 207-08. The *Long* Court held that even though RCW 51.12.102 contemplates the Department pursuing an LHWCA claim on a worker's behalf, the Department had

[2] Had Diane Lewis sought that relief, the maximum relief that would have been available would be for the short period from April 1, 2020—the date Diane Lewis filed a claim with the Department—to April 14, 2020—the date the Department determined that the worker and his beneficiaries forfeited their right to a recovery under the LHWCA by entering into a third-party settlement without the employer's permission. *See Long*, 174 Wn. App. at 207-08. Any such recovery would be subject to recoupment by the Department under RCW 51.52.102(6). Because Richard Lewis received a substantial third-party settlement, the Department would almost certainly recoup the full amount of the benefits for that two-week period, if it provided such benefits.

no obligation to pursue an LHWCA claim that no longer existed, and the claimant's LHWCA claim ceased to exist as a result of the unapproved third-party settlement. *Long*, 174 Wn. App. at 207-08. The Court also held that the Department should have provided temporary benefits for the period from the date the worker filed a claim with the Department to the date the Department determined that it was not the liable insurer. *See id*. But aside from that interim period, the beneficiary had no right to relief from the Department under any provision of the WIIA. *See id*.

Though Diane Lewis downplays this, she effectively argues that *Gorman*, *Long*, and *Olsen* are all incorrect and that all three of them misinterpreted the interaction between RCW 51.12.100 and RCW 51.12.102. AB 38-48. She suggests that RCW 51.52.102 does not provide merely for "temporary" WIIA benefits, and instead provides workers with asbestos claims an unqualified right to WIIA benefits, which cannot be properly terminated based on an unapproved settlement of a

third-party tort claim. But *Gorman*, *Long*, and *Olsen* each rejected this very argument, and those cases considered and rejected arguments based on the wording of RCW 51.52.102 that are similar to the ones Diane Lewis makes here. And *Gorman* expressly used the phrase "temporary, interim benefits" to describe the type of benefits that RCW 51.12.102 extends, unlike the full WIIA coverage of the kind she seeks here. *Gorman*, 155 Wn.2d at 211-13.

Diane Lewis tries to minimize the conflict between her arguments and *Gorman*, *Long*, and *Olsen* by contending that none of those cases addressed the issues she raises, including her constitutional arguments. AB 44. But the cases do address—and preclude—her argument that she has the right to full WIIA benefits under RCW 51.12.102.

B. The Maritime Exclusion Does Not Implicate the Right To a Jury

Nothing about RCW 51.12.100 or RCW 51.12.102 implicates the constitutional right to a jury. Diane Lewis suggests that because the constitutional right to a jury is

"inviolate" this means the Legislature cannot pass legislation that determines what civil actions are available to a worker, nor can it pass legislation regulating relief available to an injured worker. AB 29 (citing *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989)). Diane Lewis's argument is misplaced because while the Legislature cannot remove an essential function of a jury from a civil cause of action, the Legislature can eliminate a civil cause of action and replace it with a statutory remedy. And the Legislature can certainly determine what limitations apply to statutory benefit schemes such as the WIIA. Nothing in RCW 51.12.100 or RCW 51.12.102 invades an essential function of a jury.

The *Sofie* case establishes that the Legislature cannot invade the fact-finding functions of the jury in a civil case, not that the Legislature cannot limit the benefits available under benefit statutes like the WIIA. *See Sofie,* 112 Wn.2d at 656. In *Sofie*, the challenged statute placed the limit on the amount of an award for noneconomic damages, even though a

determination of the amount of a noneconomic damages award is the province of the jury. *Sofie*, 112 Wn.2d at 638, 656. The *Sofie* Court determined that the statute was unconstitutional because it invaded a factual determination reserved to the jury alone. *Id*. at 656.

But as *Afoa v. Department of Labor & Industries*, 3 Wn. App. 2d 794, 808-10, 418 P.3d 190 (2018), explains, the Legislature can eliminate a cause of action and replace it wholesale with a set of statutorily defined remedies for an injury, without violating the constitution. When the Legislature does so, it has not invaded the jury's province for a civil cause of action, because the civil cause of action no longer exists. As *Afoa* explains, the WIIA eliminated wholesale all civil causes of action between workers and employers for workplace injuries, and replaced them with a statutorily defined set of benefits. *Id*. The Legislature's power to eliminate a cause of action and replace it with a statutory set of remedies includes

within it the power to regulate when and what statutory benefits are available.

Afoa, not *Sofie*, governs because RCW 51.12.100 and RCW 51.12.102 regulate the benefits available under the WIIA and do not invade the jury's function about a civil cause of action. Neither RCW 51.12.100 nor RCW 51.12.102 limits what a jury may do or decide about a civil action against an asbestos manufacturer, so they do not implicate *Sofie* or the constitutional right to a jury. Instead, RCW 51.12.100 and RCW 51.12.102 limit the benefits a worker may receive under the WIIA when the worker has a right under federal law. Such a limitation does not implicate the constitutional provision that the legislature may not invade the jury's province.

C. RCW 51.12.100 and RCW 51.12.102 Do Not Impermissibly "Chill" the Exercise of Constitutional Rights

RCW 51.12.100 and .102 comply with all constitutional provisions, and Diane Lewis does not show otherwise. The cases she cites for the argument that RCW 51.12.102

impermissibly chills her right to a jury do not support her argument as they involve completely dissimilar statutes and legal issues. AB 28-33.

United States v. Jackson, 390 U.S. 570, 581-83, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), provides that a law cannot chill the exercise of "basic" constitutional rights. Diane Lewis has identified no basic constitutional right to workers' compensation benefits, nor is there one. Workers' compensation is not a fundamental liberty. *See Shelton v. Tucker*, 364 U.S. 479, 488-89, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960). Cases like a criminal defendant's right to a trial by jury or a citizen's right to engage in free speech or to peacefully assemble do not apply. *Contra* AB 29 (citing *Jackson*, 390 U.S. at 581-82; *State v. Frampton*, 95 Wn.2d 469, 627 P.2d 922 (1981); *Laird v. Tatum*, 408 U.S. 1, 11, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972)).

The facts make clear that there is no fundamental liberty interest at issue here. Workers receive temporary relief under

RCW 51.12.102 only while an LHWCA claim is being pursued. Diane Lewis forfeited her LHWCA claim—and thus lost her right to receive temporary benefits under the WIIA—because she settled the third-party case without an LHWCA employer's approval, not because she or Richard Lewis exercised their right to a jury. Since the Lewises settled the third-party case without the LHWCA employer's approval, they forfeited the LHWCA claim, which in turn led to the Department terminating the temporary benefits under RCW 51.12.102. She fails to show any constitutional violation about RCW 51.12.102 when it was her actions that lead to the termination of benefits.

D. Diane Lewis Fails To Establish a Violation of the Right to Equal Protection

RCW 51.12.100 and RCW 51.12.102 do not violate Diane Lewis's right to equal protection of the law. *See State v. Ward*, 123 Wn.2d 488, 515, 869 P.2d 1062 (1994). Constitutional equal protection requires similar treatment for similarly situated persons in a given class, but there is no equal

protection violation when a statute treats differently situated persons differently. *Id.*

Diane Lewis fails to identify properly the classes for the purpose of her equal protection challenge. She argues the statutes create two classes: (1) workers who file third-party claims and who had both maritime and land-based employment and (2) workers who had only land-based employment. AB 36. These classes are not similarly situated. Workers who have had maritime employment have access to a federal remedial scheme that other workers do not.

And contrary to Diane Lewis's argument (at AB 34-38), workers' compensation statutes like RCW 51.12.100 and RCW 51.12.102 are subject only to rational basis scrutiny as they do not affect a fundamental right. *See Ward,* 123 Wn.2d at 516. Under rational basis review, a law cannot be struck down as unconstitutional if the challenged statute achieves a legitimate state objective and the means the statute uses are not wholly irrelevant reasonably to achieving that purpose. *Id.* She

argues that RCW 51.12.102 irrationally deprives workers of benefits based only on the fact that they once worked in a shipyard, but this argument misconstrues the WIIA's statutory framework. AB 34-38.

RCW 51.12.100 and RCW 51.12.102 are subject to rational basis scrutiny because they regulate a worker's right to economic benefits under a state program and do not involve either a suspect class or a fundamental right. *See Campos v. Dep't of Lab. & Indus.*, 75 Wn. App. 379, 385, 880 P.2d 543 (1994). And contrary to Diane Lewis's argument (AB 34-38), RCW 51.12.100 and RCW 51.12.102 are reasonably tailored to achieve legitimate purposes. The purpose of RCW 51.12.102 is to ensure that workers can receive temporary financial relief from the Department while a federal asbestos claim is pending, and the Legislature extends temporary relief in recognition of the difficulty that workers often face in pursuing such claims under the LHWCA. But it is also RCW 51.12.102's purpose to not permanently encumber the state fund—which pays benefits

to Washington's workers—with these benefits, nor is it the purpose of the statute to provide relief to a worker even when no federal claim is pending, as is the case here. It is for that reason that the temporary benefits are terminated if there is no pending federal claim.

Diane Lewis argues that strict scrutiny should apply because the statutes "impinge" on a constitutional right: the right to a jury trial. AB 35. But as explained above, neither statute limits a worker's benefits under the WIIA based on the worker's exercise of a constitutional right to a jury trial: the Lewises lost the right to receive temporary benefits under the WIIA because they settled the third-party case without the LHWCA employers' approval, not because they exercised the right to a trial by jury.

But even if strict scrutiny applies, the statutes at issue are constitutional because Washington has a compelling state interest in ensuring that the benefits under the WIIA are provided to Washington State workers with no potential

coverage under a federal statute for their injuries, and in providing only temporary relief to workers while federal claims are pending. Nor could this legitimate goal be achieved if workers could forfeit a federal claim and continue to demand "temporary" WIIA relief.

E. Diane Lewis's Remaining Arguments Also Have No Merit

Diane Lewis argues that RCW 51.12.102's provision of only temporary benefits is contrary to the fundamental purpose of the WIIA. AB 4, 45-48. This proposition is not a basis to assert error. She essentially disagrees with the Legislature's policy decision about how best to safeguard Washington State workers. Her remedy is with the Legislature, not this Court.

In any event, there is no conflict with the grand compromise: workers who fall within the WIIA are eligible for a statutorily defined set of benefits, rather than having tort remedies available. The grand compromise applies only to the employment that the WIIA covers. While the WIIA provides for broad coverage for workers and employers (and only narrow

exceptions to coverage), coverage under the WIIA is not, and never has been, absolute. By enacting RCW 51.12.100, the Legislature knowingly excluded workers with LHWCA claims from coverage under the WIIA.

Diane Lewis is also wrong to suggest that there is some sort of constitutional right to third-party actions. AB 45-48; *see State v. Clausen*, 65 Wash. 156, 175-76, 210-11, 117 P. 1101 (1911) (upholding constitutionality of WIIA despite its limitation on tort remedies); *State v. Mountain Timber Co.*, 75 Wash. 581, 583-84, 135 P. 645 (1913). The current right to broadly file tort suits for third-party injuries while also receiving WIIA benefits provided by legislative grace is not a constitutional right. The WIIA's constitutionality does not depend on the conclusion that Diane Lewis can receive full WIIA benefits for an occupational disease that is subject to the LHWCA, nor on the conclusion that she should continue receiving "temporary" benefits while an LHWCA claim is pending even though there is no longer a valid LHWCA claim.

Diane Lewis argues that the Department's interpretation of RCW 51.12.102 puts workers in an impossible position where they may have little hope of recovery under either the WIIA or the LHWCA. AB 31-32. But this argument fails as it is based on distortions of the law.

First, Diane Lewis argues that the superior court's decision means a worker who works even "a single day" of maritime employment is automatically precluded from coverage under the WIIA. AB 6. This is incorrect. The issue under RCW 51.12.100 is whether the worker has a right or obligation for an injury under federal law, not whether the worker worked a single day in maritime employment. It is true that if a worker developed an injury or a disease as a proximate result of work that is subject to the LHWCA (which could occur on a single day), the worker's remedy lies with the LHWCA rather than the WIIA, but there must be a causal connection between the injury or disease and the LHWCA employment. And here, Diane Lewis stipulated that LHWCA employment proximately caused

Richard Lewis's disease, making the worker subject to the LHWCA for the disease. CP 397.

Second, Diane Lewis suggests that a worker would end up with neither WIIA nor LHWCA coverage if the LHWCA claim is ultimately denied. AB 4. But whether this is true depends on why the LHWCA claim is denied. RCW 51.12.100 only applies to workers with a right or obligation under certain federal laws, including the LHWCA. If an LHWCA claim is denied because the tribunal finds that the maritime employment did not proximately cause the worker's condition, then RCW 51.12.100 would not be a barrier to WIIA coverage, and the worker would be eligible for full coverage under the WIIA.

On the other hand, if the worker's LHWCA claim was denied because the worker failed to meet the LHWCA's statute of limitations, or the worker forfeited their rights under the LHWCA by entering into a third-party settlement, but there was no dispute that employment subject to the LHWCA proximately caused the worker's condition, then the worker

would not have a right under the WIIA. *See Gorman*, 155 Wn.2d at 211-13. This is because the worker in that instance had a right or obligation under federal law, they simply failed to follow the proper procedures to pursue the right. Such an outcome can be avoided by pursuing the proper procedures.

Third, Diane Lewis makes much of the fact that it would likely have been impossible for Richard Lewis to secure a recovery under the LHWCA within his lifetime. *See, e.g.*, AB 2. But this stems from Richard Lewis's medical condition, and the fact that his asbestos-related illness was diagnosed shortly before he died, and it does not show that the LHWCA or the WIIA are fundamentally flawed or that the Court should second-guess the Legislature's choices about RCW 51.12.102.

VI. CONCLUSION

For the reasons discussed above, this Court should affirm.

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RESPECTFULLY SUBMITTED this 22nd day of September, 2022.

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DIANE J. LEWIS, Individually and as Personal Representative of the Estate of RICHARD LEWIS, Appellant, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	DECLARATION OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the state of Washington, declares that on the below date, I served the Department's Brief of Respondent and this Declaration of Service in the below described manner:

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DATED this 22nd day of September, 2022 at Tumwater, Washington.

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